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No. 80-1430

In the Supreme Court of the United States

OCTOBER TERM, 1980

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

LINCOLN ISAAC, Respondent

E.P. PERINI, Superintendent, Marion Correctional Institution, Petitioner

v.

KENNETH L. BELL, Respondent

TED ENGLE, Superintendent, Chillicothe Correctional Institute, Petitioner

v.

HOWARD HUGHES, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT HUGHES

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Case No. 80-1430

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ted Engle, Petitioner

-vs-

Howard Hughes, Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF RESPONDENT HOWARD HUGHES

STATEMENT OF THE CASE

Respondent Howard Hughes concurs with Petitioner Engle's Statement of the Case (Petitioners' Brief at 7-8)[1] with two exceptions. First, Superintendent Engle maintains that the prosecution objected to the giving of the charge upon self-defense. (Pets.

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1. All subsequent references to the Petitioners' Brief will be abbreviated as "Pet.'s Brief."

Brief at 7) However an examination of the very pages of the record cited by Petitioner Engle (Hughes' State Trial Transcript 288-289; Joint Appendix 42)[2] reveals that the State Prosecutor did not object to charging the jury upon that issue. Rather, the prosecutor accepted the fact that the jury was to be charged upon the self-defense issue and used that fact as a basis to argue that under state law the accused was not entitled to instructions upon the lesser included offenses of aggravated murder and voluntary manslaughter.[3]

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2. All subsequent references to these materials will be abbreviated as "H.T." and "J.A.". The Appendix to the Certiorari Petition will be referred to as "A."

3. Under Ohio law evidence supporting a complete defense to the crime charged may preclude the jury from considering lesser included offenses. See generally State v. Nolton, 19 Ohio St. 2d 133, 249 N.E. 2d 797 (1969). It was Nolton that the prosecutor in Mr. Hughes' case cited in his argument on the objections.

For an example of the application of this doctrine, see the decision of the State Court of Appeals in Respondent Bell's case. (J.A. 18-20).

Second, Petitioner Engle claims that "Hughes' counsel specifically requested the charge on self defense." (Emphasis added) (Pet.'s Brief at 7.) But for purposes of clarity it is important to note that what Mr. Hughes' trial counsel did was to request that the trial court "charge" the jury on "self-defense."[4] At no time in the proceeding did Mr. Hughes' counsel request "the" charge which was in fact given to the jury, nor did he propose that Mr. Hughes should bear the burden of proof on that issue. To the contrary, trial counsel indicated:

> "First of all, may I say for the record that I am going to object to the entire charge in its entirety, but for one purpose. We are operating now under a new code in which many things are

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4. ". . . I would like to have the Charge of the lesser included offenses of voluntary Manslaughter, Murder and Self-defense . . ." (H.T. 288; J.A. 42).

uncertain." (H.T. at 350; J.A. 48.) (Emphasis added)[5]

At no stage in these proceedings has Mr. Hughes denied that there was sufficient evidence in the record to allow a properly instructed jury to return a verdict of guilty upon the issue of voluntary manslaughter. Likewise, Petitioner Engle has never denied that there was sufficient evidence presented at the trial to place the issue of self-defense properly before the jury. Both parties and the courts below have recognized that while detailed references to the record would allow arguments to be made, both pro and con, upon the question of guilt or innocence, such argument does little more than emphasize that this was a question for the jury. (See Pet.'s Reply Brief to Briefs in Opposition to Certiorari at 1.)

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[5]. Trial counsel's objection, when read in its entire context, seems to be directed toward other concerns. However, such a reading does not change the fact that trial counsel clearly stated "for the record" that he was objecting to the "entire charge in its entirety." (H.T. 350; J.A. 48.)

This being the case, it is unfortunate that the Amicus Curiae, United States, presents an inaccurate account of the evidence in Mr. Hughes' case.[6] (Brief of the United States 7 and 29, n. 31). A full examination of the evidence before the jury and the errors contained in the Magistrate's Report relied upon by the Solicitor General is set forth in "Petitioner [Respondent] Hughes' Memorandum on the Merits," pp. 4-13, docketed in the District Court on June 19, 1979.

At this stage in the proceedings it is sufficient to make six points in response to the Solicitor General's claims as to the status of

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6. In his statement of the case, the Solicitor General relies primarily upon the unfavorable Report and Recommendation of the Magistrate in the U. S. District Court. (J.A. 24-37.) It is significant to note that this Report was issued while Mr. Hughes was proceeding pro se and did not have the benefit of counsel to brief and argue his case. Mr. Hughes obtained counsel after the Report was issued but prior to the decision of the District Court. Counsel was able to point to no less than 11 major errors contained in that Report. See "Petitioner [Respondent] Hughes' Memorandum on the Merits" at 4-13 (docketed: 6/19/79). It is noteworthy that the District Court, while indicating it had considered the Report (A. 63), neither adopted the Report and Recommendation as its own nor incorporated any of the matters objected to in its own opinion.

the evidence in the record. First. The jury had before it evidence that Mr. Hughes was a respectable citizen and a contributing member of the community. He was a veteran of the United States Army who had served in the front lines in Korea for 16 months. (H.T. 242) During the course of that tour of duty, Mr. Hughes not only earned a combat infantry badge and a citation medal for service in Korea but also three bronze stars. (H.T. 242) At the end of service, he was honorably discharged from the Army, holding the rank of Corporal. (H.T. 243) He had no prior state or federal convictions (H.T. 276-277) and at the time of the incident had worked at the Chrysler Plant in Twinsburg, Ohio, for over 20 years. (H.T. 243)

Second. While it is true that there were seven witnesses to the shooting, any implication that these seven witneses testified that the shooting was not in self-defense is incorrect. One of those witnesses, whom the Solicitor General refers to as a "former girlfriend", did

not testify at all. A second witness, a minor child of the "former girlfriend", also did not testify. The only other adults present, Robert Logan and Minnie Jackson, both testified in the trial as defense witnesses and their testimony was consistent with Mr. Hughes' testimony that he acted in lawful self-defense. The other three witnesses--all minor children of the "former girlfriend"--did testify as witnesses for the prosecution. However, their testimony was open to question by the jury because of: (1) their ages; (2) their bias against Mr. Hughes because of past disagreements; and (3) the fact that the record indicates that one of them was being "signaled" from outside the courtroom while on the stand. See generally Mr. Hughes' District Court Memorandum, supra, at 4-13.

Third. It is true that the testimony before the jury indicated that Mr. Hughes had consumed some alcoholic beverages on the day in question. However, what the Solicitor General

fails to tell the Court is that the same testimony indicated that all of the adults present had been drinking and that the state's coroner testified that the deceased's blood-alcohol content was .14 milligrams--some 4 milligrams over the legal rate for driving while intoxicated. (H.T. 166-167)

Fourth. In claiming that the deceased attempted to shake hands with Mr. Hughes "as a gesture of friendship", the Solicitor General ignores the testimony of Robert Logan:

> "I'm telling the jury that the man walked toward Howard with his hand extended and what his intention was with the hand extended I couldn't say . . . ." (H.T. 240)

This account takes on added significance in light of Mr. Hughes' testimony, in another context, that the deceased was a larger man than he and that:

> "I couldn't let the man get a hold of me . . . ." (H.T. 264)

Equally as important, the initial recitation by the Solicitor General makes it sound as if Mr. Hughes shot the deceased when he had his hand extended. The second reference (Amicus Brief at 29, n. 31), states that the shooting occurred "immediately" thereafter. However, the record reveals that Mr. Hughes not only refused to allow the deceased to take hold of him, but that he attempted to break off all contact between them because he "turned his back and walked away." (H.T. 210; see also 218-219) It was only after that that Mr. Johnson initiated the actions which ultimately led to his death.

Fifth. The actions by the prosecutor, the trial judge, and the jury in the state trial court belie the claim made by the Solicitor General that self-defense was not properly in issue. The prosecutor did not object to the instruction upon self-defense. Rather, though he obviously did not want the jury to believe that the accused acted in self-defense, he seems

to have agreed that there was sufficient evidence to justify a self-defense instruction. (H.T. 288; J.A. 42). The trial court's indication that it would instruct upon self-defense was relatively cursory and seemed to indicate that there was no doubt in the Court's mind that such a charge was proper upon the facts before it. (H.T. 288; J.A. 42) If the charge was warranted when the defendant was erroneously required to "prove" self-defense, then it follows, a fortiori, that there was sufficient evidence to warrant the instruction when the defendant should only have had to "go forward" with evidence of self-defense.

Finally, the action of the jury--even though improperly instructed--has some bearing upon this question. If the evidence had indicated that this was the type of "cold-blooded" killing painted by the Solicitor General, then the jury would have returned a verdict of guilty upon the count of aggravated murder. The fact that the jury returned not

guilty verdicts upon both aggravated murder and murder indicates that the jury--having seen the witnesses and judged their credibility--rejected the interpretation placed upon the evidence by the Solicitor General.

Mr. Hughes submits that there can be no question but that self-defense was properly in issue. This being the case, this Court may properly consider the questions of whether the state violated Respondent Hughes' Fourteenth Amendment rights by requiring him to prove that he acted in lawful self-defense, and if so, whether the federal courts are powerless to correct an error of such magnitude.

ARGUMENT

In the interest of judicial economy and in order to avoid needless repetition, Respondent Hughes will limit his argument to those matters that are unique to his own case and, on issues of more general applicability, rely upon

the argument and legal analysis set forth in the Brief filed by Respondent Bell.

I.

The Effect of Trial Counsel's Objection to the Charge to the Jury

As set forth in the Statement of the Case, Respondent Hughes' trial counsel indicated that he was "going to object to the entire charge in its entirety . . ." (H.T. 350; J.A. 48-50) After a three-way discussion between the Court, the prosecutor, and trial counsel (H.T. 350-354; J.A. 48-50), the trial court made the following statement: "You may have your exception." (H.T. 354; J.A. 50)

These facts give rise to two possibilities. On the one hand, this Court may determine that the general objection to the "entire charge" constituted compliance with Ohio's contemporaneous objection rule--especially given the "exception" granted by the trial court and the trial court's failure to indicate that counsel

should be more specific in his objections. Obviously, if the Court adopted that view, then Mr. Hughes' trial counsel complied with the contemporaneous objection rule and there would be no occasion to consider the applicability of Wainwright v. Sykes, 433 U.S. 72 (1977).[7]

On the other hand, if this Court were to deem the objection insufficient, the fact that such an objection was made would nevertheless be relevant to the issues before the Court concerning the "adequacy" of the asserted independent state ground and the existence of "cause" under Wainwright. Trial counsel made it abundantly clear that the reason he was objecting to the "whole charge" was because the state had adopted "a new code in which many things are uncertain . . ." (H.T. 350; J.A. 48). As the court indicated in Holmes v. Israel, 453 F. Supp. 864 (E.D. Wisc. 1978), aff'd without published opinion, 618 F. 2d 111 (7th Cir. 1980):

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[7]Under the en banc decision in Isaac v. Engle, 646 F. 2d 1129 (6th Cir. 1980) (A. 1-22), Mr. Hughes was entitled to judgment in his favor without respect to whether the objection of his counsel was or was not judged sufficient to preserve the error. Consequently, it was unnecessary for the Circuit Court below to resolve that issue and there is nothing in their one-page opinion to indicate that they did so. (A. 60.)

> This indicates that one of the Wainwright court fears, 'sand bagging' by the defense counsel, . . . does not apply in this case because the making of the general objection and the motion for mistrial indicate that defense counsel was not engaged in 'sand bagging.'" Id. at 867.

Both the statement of the reason for making the objection, as well as the objection itself, indicate that there was no deliberate attempt to build reversible error into the record in this case. Further, the fact that this error was not raised on appeal and that the habeas corpus action was filed pro se, belies any claim that counsel made a strategic decision to "reserve" the error in hopes of obtaining a new trial by raising the issue in future proceedings. Under these circumstances, the state lacks the interest necessary to legitimize the enforcement of its contemporaneous objection rule. Further, even if such a rule were to be applied, these same factors would constitute "cause" within the meaning of Wainwright v. Sykes, supra.

II.

The Effect of the Actual Futility of Making an Objection Upon the Adequacy of an Asserted Independent State Ground and on "Cause"

It has long been established that the law will "not require the doing of a futile act." Ohio v. Roberts, 448 U.S. 56, 74 (1980). This is a familiar doctrine in determining whether a state procedural rule constitutes an adequate and independent state ground to preclude the vindication of federally protected rights. E.g., Douglas v. Alabama, 380 U.S. 415, 422 (1965). See also Estelle v. Williams, 425 U.S. 501, 512, n. 8 (1976) (noting that an objection would not have been "fruitless").

Within the context of habeas corpus litigation, it is well established that in spite of the requirement to exhaust state remedies, 28 U.S.C. Section 2254(b) and (c), exhaustion does not require a "futile" act or an "idle or useless effort." E.g., Tatzel v. Hanlon, 530 F. 2d 1205, 1206 (5th Cir. 1976); Lewis v. New

Mexico, 423 F. 2d 1048, 1049 (10th Cir. 1970). The exhaustion doctrine, like the procedural default principle of Sykes, supra, is based on comity. Fay v. Noia, 372 U.S. 311, 418-420 (1963). Just as comity does not require vain acts under Section 2254(b) and (c), neither does it require vain acts under Sykes. The state has no valid state interest in the enforcement of a procedure that would be futile. Further, futility itself constitutes "cause" under Wainwright.

In Isaac v. Engle, 646 F. 2d 1122 (6th Cir. 1980), the panel decision authored by Senior Judge Peck concluded that "[t]o require an objection in these circumstances would be to require the doing of a vain act." Isaac, supra at 1126 (A. 30). Since this conclusion was based upon a consideration of state law by the Circuit Court, it may be entitled to preferential consideration. E.g., Rummel v. Estelle, 445 U.S. 263, 267, n. 7 (1980); Jenkins v. Anderson, 447 U.S. 231, 234, n. 1 (1980). This

could be particularly true in this instance since Judge Peck may have special insight into both the status of the state law question and the futility of the objection given his prior experience as an Ohio Common Pleas Judge and a Justice of the Ohio Supreme Court. See THE AMERICAN BENCH 37 (1979) (biography).

As developed fully in Respondent Bell's Brief, the conclusion of the Isaac panel is fully supported not only by logic and reason, but also by this Court's decision in O'Connor v. Ohio, 385 U.S. 92 (1966). See also State v. Cowans, 10 Ohio St. 2d 97, 104, 227 N.E. 2d 201, 207 (1967). The very same point was made by the Ohio Court of Appeals in State of Ohio v. Newell Junior Hamilton, No. 5088 (2nd Dist. Ohio Ct. App., Mont. Cty., December 9, 1976) at 3:

> "Here, an objection to the instruction on self defense, even if made at the time of the trial, would have been a vain act, and the belated application of Rule 30 to the circumstances outlined herein would be offensive to basic fairness." (Emphasis added.) (Copy reproduced in Respondents' Addendum.)

As strong as this conclusion is on general principles, there are specific facts which are even more compelling to Mr. Hughes' case. Under Ohio law a decision of a state Court of Appeals is binding upon all the trial courts within its district. E.g., In re Schott, 16 Ohio App. 2d 72, 75, 241 N.E. 2d 773, 776 (1968). Greenwood v. City of Portsmouth, 29 Ohio Misc. 161, 164-165, 281 N.E. 2d 45, 47 (Common Pleas, 1971).

Respondent Hughes was indicted and tried in Summit County, Ohio. Summit County is one of four counties in the Ninth Judicial District of the Ohio Court of Appeals. Mr. Hughes' trial commenced on January 21, 1975. (H.T. 6) Closing arguments were given on January 24 (H.T. 291) and the jury was instructed on that same day. (H.T. 330) Two days prior to the date on which the jury instructions were given, the Ninth District Court of Appeals issued its opinion in State of Ohio v. Robert L. Ladany, No. 7534 (9th

Dist. Ohio Ct. App., Summit Cty., January 22, 1975). After quoting and construing R.C. 2901.05, that Court held:

> ". . . we believe there is no change from the time honored rule that intoxication . . . when claimed by a defendant . . . must be established by a preponderance of the evidence." Ladany, supra at 9. (Copy reproduced in Respondents' Addendum at 66, 74.)

Based upon Ladany, the trial court--even had it interpreted R.C. 2901.05 in the same manner as it was subsequently viewed in State v. Robinson, 47 Ohio St. 2d 103, 251 N.E. 2d 58 (1976)--would still have been bound to instruct the jury that the accused bore the burden of proof on self-defense.

Indeed, the actual futility of raising the objection to the jury instructions here is forcefully demonstrated by that same Court's decision nine months later in State of Ohio v. Robert Earl Morrow, No. 7757 (9th Dist. Ohio Ct. App., Summit Cty., October 22, 1975). The third assignment alleged that error was committed:

"' * * * in instructing the jury that the defendant-appellant must prove his defense of self-defense by a preponderance of evidence.'" Id. at 3.

The Court's entire disposition of that error read as follows:

"From the time when the memory of man runneth not to the contrary, the rule in Ohio has been:

'On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self defense rests on the defendant, and must be established by a preponderance of the evidence.'

Silvus v. State, 22 Ohio St. 90, Ezell v. State, 119 Ohio St. 39; Section 2901.05 R.C.

We reject assignment of error three." Id. at 4.

Consequently, Respondent Hughes maintains that any attempt to raise an objection on the jury instruction in question would have been futile in fact. The trial court not only would have disagreed with counsel but would have actually lacked the power to give a proper instruction because of the precedent binding

upon it. Under these circumstances, the state's interest in enforcing the contemporaneous objection rule is not sufficient to sustain it as an "adequate" state ground for barring review. Further, the actual futility would, itself, constitute "cause" under Wainwright.

III.

Prejudice and the Relationship between Self-defense and Manslaughter

The erroneous jury instruction in the case at bar shifted the burden of proof from the State and placed that burden upon the accused upon the issue of self-defense--the major factual question disputed before the jury. An error in the burden of proof in a criminal trial "substantially impairs" the "truth-finding function" and therefore "raises serious questions about the accuracy of the guilty verdicts in the past trials . . ." Hankerson v. North Carolina, 432 U.S. 233, 243 (1977) quoting and adding emphasis to Ivan V. v. City of New York, 407

U.S. 203, 204 (1972). See also Sandstrom v. Montana, 442 U.S. 510, 523-524 (1979). Consequently, such an error is per se prejudicial. Isaac v. Engle, supra at 1129 (panel decision, Judge Celebrezze, concurring); Isaac v. Engle, supra at 1134 (plurality en banc decision).

In the case of Respondent Hughes, the prejudice is particularly acute because of the fact that even with the erroneous jury instruction, the jury in his case nevertheless acquitted him of both aggravated murder and murder. It is true that the same jury also convicted him of voluntary manslaughter. But that fact, rather than mitigating the error, highlights the degree of prejudice. In Ohio, as in most states, there is great similarity between the facts that the jury must find to be true in order to reduce the crime of murder to

voluntary manslaughter and facts that would support a reasonable doubt as to whether or not the accused acted in lawful self-defense.[8]

Indeed, logical and common sense will bear out the fact that the "provocation" of

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[8]With respect to voluntary manslaughter, Section 2903.03(a) of the Ohio Revised Code provides:

> "No person, while under extreme emotional stress brought by serious provocation reasonably sufficient to incite him into using deadly force, should knowingly cause the death of another."

While there is no statutory definition of self-defense in the State of Ohio, the Ohio Supreme Court has indicated that there are three "elements" to self-defense:

> a. "The slayer was not at fault in creating the situation giving rise to the affray . . . ;
>
> b. "The slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; . . . and
>
> c. "The slayer must not have violated any duty to retreat or avoid the danger . . . " (Citations omitted.)

State v. Melchior, 56 Ohio St. 2d 15, 20-21, 381 N.E. 2d 195, 199 (1978).

manslaughter and the "justification" of self-defense are different ends of the same continuum. In a given fact situation, it is entirely conceivable that while a defendant may have actually been in serious fear of great bodily harm or death, the jury may nevertheless determine that such fear was not reasonable and hence find that he is not justified in acting in self-defense. The same jury may nevertheless find that the actions of the deceased constituted sufficient "provocation" to justify returning a verdict of guilty of voluntary manslaughter. Alternatively, one can imagine situations where the jury, if it credited the entire testimony of the accused, would return a verdict of not guilty based upon self-defense. Yet, a jury might reasonably credit some but not other portions of a defendant's testimony and therefore return a guilty verdict of voluntary manslaughter. It is because of circumstances such as these that the provocation necessary for voluntary manslaughter has often been referred

to as "imperfect" self-defense. See generally LaFave and Scott, Section 77, pp. 583-584 (1972) and I Warren on Homicide Section 151 (1914). This point is borne out by the case of State v. Vancak, 90 Ohio St. 211, 107 N.E. 511 (1914). There, the Ohio Supreme Court discussed the relationship between manslaughter and self-defense:

> "If the blow was struck in self-defense, then the act was lawful, and the accused innocent of any crime. If the blow was not struck in self-defense, then the act was unlawful, and, death having ensued, the accused was guilty of manslaughter, unless the elements of murder in the first degree or murder in the second degree were present . . . ." 90 Ohio St. 214-215, 107 N.E. at 512.

Further, the Court indicates that since the jury found the defendant not guilty of murder in the first degree or in the second degree:

> ". . . it follows that if he fails to sustain his plea of self-defense by a preponderance of the evidence, he was guilty of manslaughter . . . ." Id.

Consequently, Respondent Hughes maintains that as great as the prejudice was in the cases of Respondents Bell and Isaac, it was even more evident in his own case. It was entirely possible that the jury found there was at least a reasonable doubt as to whether he was acting in self-defense, but failed to acquit him solely because of the view that he failed to prove self-defense by a preponderance of the evidence. This being the case, the same evidence which raised a reasonable doubt upon guilt or innocence on the self-defense issue could well have been used by the jury to reduce the alleged crime from murder to voluntary manslaughter.

CONCLUSION

The general principles which call for the affirmance of the decision of the Circuit Court below in Respondent Bell's and Respondent Isaac's cases also support a judgment in favor of Mr. Hughes. While the close relationship between self-defense and the provocation aspect of manslaughter injects a heightened visability to the prejudice in Mr. Hughes' case, it cannot be doubted that jury instructions shifting the burden of proof prejudiced each of the Respondents. Moreover, the particular facts of Mr. Hughes' case--the objection made by his counsel at trial and the demonstration of the actual futility in the making of such an objection--illustrate both the inadequacy of the state's interest in the enforcement of Ohio Criminal Rule 30 and the existence of "cause"

for all three Respondents. Accordingly, Respondent Hughes submits that the judgment of the Sixth Circuit United States Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Brief were sent by first-class mail to counsel for Petitioners Engle and Perini, William J. Brown, Simon B. Karas, and Richard David Drake, 30 East Broad Street, Suite 1513, Columbus, Ohio, 43215, and to counsel for Respondent Isaac, James R. Kingsley, 157 West Main Street, Circleville, Ohio 43113, on this ___ day of August, 1981.

The address of Petitioner Engle is: 15802 State Route 104, Chillicothe, Ohio 45601. The address of Petitioner Perini is: P. O. Box 57, Marion, Ohio 43302. The address for Respondent Isaac is: 310 Roy Avenue, Circleville, Ohio 43113.

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